Lim Siaw Ying v Wong Seng & Anor

HIGH COURT (KUCHING) — DIVORCE PETITION NO 33–14 OF 2005–II
ABDUL AZIZ ABDUL RAHIM J
16 JANUARY 2009

Family Law — Divorce — Adultery — Proof — Circumstantial evidence of adultery — Nature of evidence required — Whether court may draw inference of guilt

Family Law — Financial obligation — Maintenance — Principles — Husband's duty to provide reasonable accommodation for wife and children — Court to consider means and needs of parties — Whether husband's means of income and health relevant — Whether wife and children entitled to enjoy lifestyle as before breakdown of marriage

Family Law — Matrimonial property — Equal division of matrimonial assets after sale — EPF contributions and insurance policies — Whether EPF accounts of husband and wife to be included as matrimonial properties — Whether life insurance policies held on trust for children

The petitioner and the first respondent were lawfully married in accordance with the provisions of the Law Reform (Marriage and Divorce) Act 1976 ('Act') and had two children. The petitioner filed this divorce petition, inter alia, on the grounds that the first respondent had committed adultery with the second respondent and that the first respondent had on numerous occasions violently assaulted and battered the petitioner. The petitioner prayed for, inter alia, the following reliefs: (i) that the marriage be dissolved; (ii) that the first respondent pay maintenance for the petitioner and her two children; (iii) damages for adultery; (iv) that the first respondent transfer their two condominiums into the joint names of the children upon full payment; (v) that the first respondent vacate the condominium at Kasuma Resort, Kuching to provide home for the petitioner and the children; (vi) that the first respondent's life and endowment insurance and EPF contributions be held by the first respondent on trust for the two children; (vii) that the petitioner be given the matrimonial jewelleries; and (viii) that the first respondent be restrained from assaulting or molesting the petitioner.

Held, allowing the petitioner's application:

(1) In awarding maintenance, the sum awarded must be reasonable to enable the wife and the children to enjoy the lifestyle they were used to before the breakdown of the marriage. Having regard to the evidence as to the means and needs of the parties and the law, a sum of RM1,500 per month was a reasonable award of maintenance for the petitioner and the two children. The fact that the first respondent had no steady job or income or that he had medical and health problem with his diabetes, was not an excuse for the first respondent to avoid maintaining the petitioner and the two children (see paras 27 & 36).

(2) In the event the Kasuma Resort Condominium property, which was under foreclosure proceedings, was auctioned off by the bank, 50% of any excess or residue of the proceeds of the sale or auction after deducting repayment of the bank's loan and other permitted legal expenses connected with the auction or sale was to be paid to the petitioner (see para 41).

(3) The petitioner's act of moving out of the Kasuma Resort Condominium without being asked to by the first respondent was justified in the circumstances of the case. However, in the circumstances of the case, it was not just and fair or practical to order the first respondent to vacate the Kasuma Resort Condominium and to pay off the bank loan. The first respondent did not have the financially means to do so. Therefore, the first respondent had to provide a reasonable and suitable accommodation of a standard as close as possible to the standard of living the petitioner and the children had enjoyed before the breakdown of the marriage. In the alternative the first respondent was to pay the petitioner a sum of RM2,000 per month to enable the petitioner to rent or purchase a suitable accommodation. This payment was to continue until the children reached 18 years of age or until the petitioner remarried which ever was the later (see paras 51 & 52).

(4) With regard to the jewelleries, s 76(4) of the Act empowers the court to divide the matrimonial assets or the proceeds of the sale thereof in such proportions as the court thinks reasonable, except that the acquirer of the property in question should receive a greater share ie more than half. Based on the facts, the court awarded the petitioner RM15,000 and also let the petitioner keep the other jewelleries already with her (see para 54).

(5) Both EPF accounts of the first respondent and the petitioner were to be included as matrimonial properties. Out of the total sum saved in both accounts, the petitioner may use only 40% and the other 60% was to be held in trust for the two children. The first respondent had to

continue to maintain the life insurance policies till maturity and the policies were to be held on trust for the two children (see paras 57 & 59).

(6) An injunction restraining the first respondent from assaulting, molesting or interfering with the petitioner was granted. However damages was not granted for assault, battery and cruelty since it is not provided for in the Act and such general damages were not prayed for in the petition (see para 68).

(7) Circumstantial evidence to prove adulterous affair must be so strong that an innocent by stander would reasonably of the opinion that the alleged act has been committed. The evidence must to beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things adultery must have been committed. The court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation. The court was satisfied that the first and second respondents had an adulterous affair and that the presence of the second respondent had contributed significantly to the breakdown of the marriage. Therefore, the second respondent was ordered to pay the petitioner RM50,000 in damages to be held in trust by the petitioner for the two children until they reached the age of 18 years (see paras 77 & 78).

[Bahasa Malaysia summary

Pempetisyen dan responden pertama berkahwin secara sah mengikut peruntukan Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') dan mempunyai dua orang anak. Pempetisyen memfailkan petisyen perceraian ini, atas alasan, antara lain, bahawa responden pertama telah melakukan perzinaan dengan responden kedua dan responden pertama telah beberapa kali menyerang dan memukul pempetisyen. Pempetisyen memohon, antara lain, untuk relief-relief berikut: (i) bahawa perkahwinan itu dibubarkan; (ii) bahawa responden pertama membayar nafkah kepada pempetisyen dan dua orang anaknya; (iii) gantirugi kerana melakukan perzinaan; (iv) bahawa responden pertama memindahkan dua buah kondominium kepada nama anak-anak selepas pembayaran penuh; (v) bahawa responden pertama mengosongkan kondominium di Resort Kasuma, Kuching untuk menyediakan tempat tinggal kepada pempetisyen dan anak-anak; (vi) bahawa insurans hayat dan endowmen responden pertama dan sumbangan EPF dipegang oleh responden pertama atas amanah bagi kedua-dua anaknya; (vii) bahawa pempetisyen diberikan barang kemas perkahwinan; dan (viii) bahawa responden pertama dihalang daripada menyerang atau mencabuli pempetisyen.

Diputuskan, membenarkan permohonan pempetisyen: A

(1) Dalam memberi nafkah, jumlah yang diberikan hendaklah munasabah untuk memastikan isteri dan anak-anak menikmati kehidupan seperti sebelum keretakan perkahwinan. Dengan mengambilkira bukti dan juga keperluan pihak-pihak dan undang-undang, jumlah sebanyak RM1,500 sebulan adalah nafkah yang munasabah bagi pempetisyen dan dua orang anaknya. Fakta bahawa responden pertama tidak mempunyai pekerjaan atau pendapatan yang tetap atau dia mengalami masalah perubatan dan kesihatan dengan diabetes bukan satu alasan buat responden pertama untuk mengelak daripada memberi nafkah kepada pempetisyen dan dua orang anaknya (lihat perenggan 27 & 36). B C

(2) Jika Kondominium Resort Kasuma, yang di bawah prosiding halang tebus, dilelong oleh bank, 50% daripada lebihan atau baki daripada hasil jualan atau lelongan selepas ditolak bayaran pinjaman bank dan bayaran guaman berkaitan dengan lelongan atau jualan hendaklah dibayar kepada pempetisyen (lihat perenggan 41). D

(3) Tindakan pempetisyen berpindah daripada Resort Kasuma tanpa disuruh oleh responden pertama adalah tepat mengikut keadaan kes ini. Walau bagaimanapun, di dalam kes ini, adalah tidak adil dan saksama atau praktikal untuk mengarahkan agar responden pertama mengosongkan Kondominium Resort Kasuma dan membayar pinjaman bank. Responden pertama tidak mempunyai sumber kewangan untuk berbuat demikian. Oleh itu, responden pertama perlu menyediakan penginapan yang sesuai dengan taraf kehidupan sepertimana yang dinikmati oleh pempetisyen dan anak-anak sebelum keretakan perkahwinan. Sebagai alternatif, responden pertama perlu membayar sejumlah RM2,000 sebulan supaya pempetisyen boleh menyewa atau membeli penginapan yang bersesuaian. Bayaran ini berterusan sehingga anak-anak mencapai usia 18 tahun atau sehingga pempetisyen berkahwin semula yang mana yang terkemudian (lihat perenggan 51 & 52). E F G

(4) Berkaitan dengan barang kemas, s 76(4) Akta memberi kuasa kepada mahkamah untuk membahagikan aset perkahwinan atau hasil jualannya dalam mana-mana bentuk yang mahkamah rasakan sesuai, kecuali orang yang memperoleh harta itu seharusnya menerima bahagian yang lebih besar iaitu lebih daripada separuh. Berdasarkan fakta, mahkamah memberikan pempetisyen RM15,000 dan juga membenarkan pempetisyen menyimpan barang kemas yang sudah ada dalam simpanannya (lihat perenggan 54). H I

(5) Kedua-dua akaun EPF responden pertama dan pempetisyen termasuk di dalam harta-harta perkahwinan. Daripada jumlah kedua-dua akaun itu, pempetisyen boleh menggunakan 40% dan sebahagian lagi 60%

dipegang atas amanah bagi kedua-dua orang anaknya. Responden pertama perlu terus mengekalkan polisi insurans hayat sehingga matang dan polisi-polisi itu akan dipegang atas amanah bagi kedua-dua orang anaknya (lihat perenggan 57 & 59).

(6) Satu injunksi untuk menghalang responden pertama daripada menyerang, mencabuli atau campur tangan dengan pempetisyen telah diberikan. Walau bagaimanapun gantirugi tidak diberikan untuk serangan, pukulan atau sebarang kezaliman memandangkan ia tidak diperuntukkan di dalam Akta dan gantirugi am tidak dipohon di dalam petisyen (lihat perenggan 68).

(7) Keterangan ikut keadaan untuk membuktikan hubungan perzinaan hendaklah cukup kuat sehingga seseorang yang berada di tempat kejadian beranggapan bahawa perkara tersebut benar-benar berlaku. Keterangan mestilah lebih daripada membuktikan syak wasangka dan peluang untuk melakukan perzinaan dan mestilah sesuatu yang memuaskan mahkamah bahawa daripada keadaan itu perzinaan telah dilakukan. Mahkamah tidak akan membuat inferens bersalah melainkan berdasarkan fakta, tiada penjelasan lain dapat diberikan. Mahkamah berpuas hati bahawa responden pertama dan kedua telah melakukan hubungan perzinaan dan kehadiran responden kedua telah sedikit sebanyak menyumbang kepada keretakan perkahwinan. Oleh itu, responden kedua diperintahkan untuk membayar kepada pempetisyen RM50,000 sebagai gantirugi dan dipegang atas amanah oleh pempetisyen bagi dua orang anaknya sehingga mereka mencapai usia 18 tahun (lihat perenggan 77 & 78).]

Notes

For a case on equal division of matrimonial assets after sale, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 3639.

For cases on adultery, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3065–3079.

For cases on maintenance, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3319–3345.

Cases referred to

C v A [1998] 7 MLJ 101, HC (refd)

Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo [2002] 2 MLJ 97, CA (refd)

James Jemut Masing v Fiona Frances Masing nee Henderson [1994] MLJU 531; [1994] 2 CLJ 390, HC (refd)

Lee Yu Lan v Lim Thain Chye [1984] 1 MLJ 56, HC (refd)

Lim Kuen Kuen v Hiew Kim Fook & Anor [1994] 2 MLJ 693, HC (folld)

Raquiza v Raquiza [1947] MLJ 202, HC (refd)

Sivajothi a/p Suppiah v Kunathasan a/l Chelliah [2006] 3 MLJ 184, HC (refd)

Wee Hock Guan v Chia Chit Neo & Anor [1964] MLJ 217, HC (folld)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 76(4), 77, 78, 92, 93, 93(2)

Keith Chin (Francis Teron with him) (Thomas, Shankar Ram & Co Advocates) for the petitioner.
Roger Chin (Roger Chin & Co Advocates) for the first and second respondents.

Abdul Aziz Abd Rahim J:

[1] The petitioner and the first respondent were lawfully married on 26 September 1992 as shown in exh P1 — the marriage certificate — and the marriage was solemnised at Persatuan Foochow Kuching and was registered in accordance with the Law Reform (Marriage and Divorce) Act 1976 ('LRMD 1976').

[2] After the marriage the petitioner and the first respondent cohabited at No 238, Tabuan Height Kuching and elsewhere.

[3] Prior to the marriage, the petitioner was working in Holiday Inn Kuching and later with Kuching Plywood Bhd. After meeting the first respondent in 1985, the petitioner quit her job in 1989 and went to work with the first respondent's company known as Leasewell Leasing Sdn Bhd as an administrative executive whilst the first respondent is the sales manager. At present the petitioner is an administration manager (account) at Juara Serata Sdn Bhd, Kuching.

[4] Out of the said marriage the petitioner and the first respondent have two children — Miss Cassandra Wong Xieyue who was born on 31 October 1995 as evident by the birth certificate exh P2 and Master Leonard Wong Wui Loong who was born on 23 August 2000 as evident by the birth certificate exh P3.

[5] The petitioner stated four main grounds for the petition. Firstly, the marriage with the first respondent has broken irretrievably and all attempts at reconciliation had failed. The petitioner and the first respondent have not slept together since June 2003 and have lived apart since 25 December 2004. Secondly, the first respondent has committed adultery with the second respondent and that the petitioner cannot be reasonably be expected to live with the first respondent and that the petitioner found it intolerable to live with the first respondent. Thirdly, the first respondent had shown total disrespect for the petitioner and very often made rude and abusive remarks at the petitioner. Fourthly, the first respondent had on numerous occasions

violently assaulted and battered the petitioner causing the petitioner to sustain shock, injuries, pain and sufferings, mental distress, loss and damage and since February 2004 the first respondent had neglected his matrimonial responsibilities and had been found to be having an adulterous affair with the second respondent.

[6] In the circumstances, the petitioner prays for the marriage to be dissolved and that the first respondent be ordered to pay for the maintenance of the petitioner and her two children be assessed and the maintenance be paid to the children until they reach 21 years old. The petitioner also prays for the custody, care and control of the two children with reasonable access to be given to the first respondent. Further, the petitioner also prays for damages for adultery against the first and second respondents. The petitioner prays: (a) that the first respondent be ordered to pay monthly instalments for the two condominiums registered in the joint names of the petitioner and the first respondent and upon full payment, to transfer the two properties into the joint names of the children as security for their future, welfare and education; (b) that the first respondent vacate the condominium at No 506 Block Camilla, Kasuma Resort, Kuching to provide home for the petitioner and the children. That the RM16,034.67 the balance of proceed of sale of one of the matrimonial properties owned by the first respondent and held by Messrs SK Ling & Co Advocates be paid to the petitioner; (c) that the first respondent be ordered to pay monthly instalments for the petitioner's Proton Waja which is still under finance till full and final payment; (d) that first respondent be restrained from transferring out, siphoning off and or however disposing or dissipating the fund from the life and endowment insurance and EPF contributions of the first respondent and that the said fund be held by the first respondent on trust for the two children; (e) that the petitioner keeps the matrimonial jewelleries and the first respondent be ordered to deliver to the petitioner the said jewelleries; and (f) that first respondent or his agents and servants be restrained from assaulting, molesting and interfering with the petitioner.

[7] In his answer to the petition, the first respondent blamed the petitioner for the break down of the marriage. The first respondent averred that it was the petitioner who insisted the first respondent to sleep in another room so that the first respondent could watch TV without disturbing the petitioner's sleep. The first respondent alleged that the petitioner had neglected all reconciliatory attempts by neglecting and deserting the family. The first respondent also said that the petitioner keeps an irregular lifestyles and late hours at night. The first respondent said the petitioner had a penchant for drinking and was keeping late nights; and that when the petitioner returned home from her nights out, she would smell of alcohol and tobacco. The first respondent also alleged one Regina Chai, brought the two children Cassandra

and Leonard to a pub at Jalan Mendu, Kuching. There the first respondent alleged that the petitioner and her sister-in-law smoked and drank liquor in front of the children and they went back home only after past midnight.

[8] As to his relationship with the second respondent, the first respondent claimed that he only came to know the second respondent in 2007 and his friendship with the second respondent started only after the marriage had broken down.

[9] The petitioner, claimed the first respondent, did not show due respect to the first respondent or had any consideration for the first respondent's feelings and well being. It was alleged that the petitioner had on several occasions undermined the first respondent's position as her husband and also as Manager of Leasewell Leasing Sdn Bhd, Kuching where both of them worked from 1992 to June 2004. One of such occasions was in March 2004 when the petitioner started an uproar at their work place where she violently erupted in anger and publicly berated the first respondent. The incident was witnessed by one of the employee, Mr Lau Gee Hong. It was also alleged that the petitioner threatened to poison the children to death to antagonise the first respondent. The first respondent said he informed his mother Mdm Chua Geok Hiong about this threat.

[10] It was alleged that the petitioner constantly displayed unacceptable and neurotic behavior. The petitioner in her anger had used her long fingernails to scratch the first respondent causing abrasions to various parts of his body. Sometime in April 2004, when the first respondent returned to the condominium at the Kasuma Resort to collect his personal effect, the petitioner approached the first respondent at the lift and viciously verbalising her suspicion that the first respondent was having an adulterous affair and started to stab the first respondent with her Proton Waja's car keys. As a result the first respondent alleged he suffered multiple puncture wounds on his body.

[11] The first respondent alleged that the petitioner also assaulted him on several other occasions. In May 2004, the first respondent said that the petitioner repeatedly and violently struck the first respondent on the head an thighs with a hand-held electric motorised massager/machine causing the first respondent to suffer more injuries. Then in June 2004 once again the petitioner assaulted the first respondent with her car keys.

[12] In one of her tantrums and outburst in June 2004, the first respondent alleged that the petitioner intentionally picked up the first respondent's handphone and smashed it on the floor.

[13] On his part the first respondent denied hitting the petitioner with the incense burner at their condominium at Kasuma Resort. Instead the first respondent said during one of the quarrels which they often had the first respondent raised the incense burner to prevent the petitioner from hitting him further. The first respondent also denied kicking the petitioner in the stomach during the fight. The first respondent said that his plea to the petitioner to stop the fight was not heeded; so he had to use his legs to push the petitioner away and to shield himself from more blows.

[14] The first respondent denied having an adulterous affair and said that the claim by the petitioner was baseless. The first respondent averred that the petitioner had a fixated paranoia or obsession about the first respondent having an affair. The first respondent claimed that this neurotic behavior of the petitioner was probably due to the petitioner's psychological disorder and this condition was admitted by the petitioner in that she had been recommended by one Dr Lee of Klinik Chiew to undergo psychotic treatment and medication. The first respondent alleged because of this psychological disorder the petitioner was unstable and this is reflected when the petitioner admitted to the first respondent that she had spiked his milo beverage with rat poison since end of July 2004. The first respondent also claimed that the petitioner had also administered poisonous substance into the first respondent's hair shampoo and nasal spray with intent of causing injury and harm to the first respondent. The first respondent said the petitioner admitted to doing all this to the first respondent's mother.

[15] The first respondent also denied that he had used the knife to threaten the petitioner and had caused the petitioner to cut his finger. Instead the first respondent said that as stated in his police report on the incident he got hold of the knife solely with intent to gain the upper hand but without any intention to inflict any harm on the petitioner. But it was the petitioner who then panicked and seized the knife and as a result had cut her own finger.

[16] In other words, the first respondent blamed the petitioner's erratic and neurotic behavior for the breakdown of the marriage.

[17] On the family finances, the first respondent claimed that from the onset of their marriage the first respondent and the petitioner had maintained joint names accounts of which the petitioner was also one of the signatories for the cheques drawn on the joint accounts. The first respondent said he had taken care of the household finance and had fulfilled his financial duties as a father and bread-winner of the family.

[18] On the issue of maintenance the first respondent averred that no maintenance is to be paid to the petitioner as her income is more than

enough to support herself. However the first respondent agreed that reasonable maintenance for the two children is to be shared equally between the petitioner and the first respondent. But the first respondent claimed that his income had been adversely affected by the waning revenue of Wirasaga Agencies, the insurance agency of which the first respondent was one of the agent. The first respondent said his average monthly commission from the insurance premium was about RM400–RM500. Furthermore, the first respondent averred that he no longer enjoyed the commission from car sales since his resignation from Leasewell Leasing Sdn Bhd since June 2004.

[19] In his answer to the petitioner's petition, the first respondent also alleged that the petitioner had admitted to him about the adulterous affair with one Ah Long at their Kasuma Resort Condominium. However there is no direct evidence on this and whatever evidence adduced by the first respondent on this issue is so minimal that the court is unable to draw any conclusive inference as to the fact of the alleged adulterous affair having regard to the law the adultery must be proved beyond reasonable doubt.

[20] However halfway through the hearing of the petition, the parties have agreed to mutual dissolution of the marriage and had further agreed to the care, custody and control of the children be given to the petitioner with reasonable access given to the first respondent. With that, the remaining issues left for determination are damages, adultery maintenance and division of matrimonial property.

[21] With regard to the matrimonial assets, the first respondent averred that the petitioner contributed negligibly towards the acquisition of the said matrimonial assets and properties.

[22] In the circumstances of this case there are only three main issues that require determination. The first issue is maintenance of the petitioner and the two children. The second issue is the division of the matrimonial property and thirdly, damages for adultery.

ON MAINTENANCE

[23] With regard to the provision of maintenance for the petitioner and the two children, the first respondent testified that he is willing to provide for them but given the present circumstances he is in, he was and is not able to. He told the court in his evidence that he has no permanent job and therefore has no regular income. On average he said he earned RM300–RM400 per month as car salesman and doing odd jobs. He testified that he could only

afford RM150 as maintenance at present and is willing to increase the amount if he gets a steady employment and as his financial situation improves.

[24] As for the maintenance of the two minor children Miss Cassandra and Master Leonard, learned counsel for the first respondent's counsel submitted that the court must consider the reasonable need of the children for accommodation, clothing, food and education and balance this with the means of the father to pay maintenance. Taking this approach, it was submitted for the first respondent that on evidence in this case it is clear that the petitioner is having a steady earning job as an administrative and account manager in a private firm ie Juara Serata Sdn Bhd earning a monthly salary of RM2,700, excluding bonuses. Whereas the first respondent is currently unemployed and is doing car sales earning between RM300 to RM400 per month. Even that the income is not regular and can hardly meets his own needs.

[25] Learned counsel for the first respondent cited the case of *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97 where the Court of Appeal refused to grant the wife's claim for maintenance for herself and a child in the sum of RM50,000 per month after taking into consideration that the wife also had a price to pay for the breakdown of the marriage. The court instead awarded the wife's maintenance of RM25,000 per month for her and her child. Of course in that case the husband's financial position was in very much better position than most — the husband was a multi-millionaire and a fact which the court did not doubt as the court in that case found that the husband 'is not a struggling wage earner as he could afford lavish overseas holidays for the family and was generous towards the wife'. On the same vein, learned counsel for the first respondent urged the court in this instant to consider that the petitioner also had to pay the price for the breakdown of the marriage.

[26] It is also in evidence and not in dispute that the two children in this instant attended various activities besides their normal school activities. The two children in this case attended various additional classes like piano classes, tuition classes and swimming classes and also self defence classes. These additional classes are good to have as testified by the petitioner provided the parents can afford it and are able to pay for them. However in my view they are not absolute necessity to have to develop the children into person of character or a rounded individual. In the circumstances, learned counsel for the first respondent submitted that it would be unfair to penalise the first respondent by ordering him to provide for these various activities of the children when the first respondent is himself struggling to ends meet in his daily life.

[27] One of the considerations in awarding maintenance is that the sum awarded must be reasonable to enable the wife and the children to enjoy the lifestyle they were used to before the breakdown of the marriage. This was the consideration on which the wife in *Diana Clarice*'s case premised her claim for RM50,000 per month and it is also the consideration on which the Court of Appeal allowed the RM25,000 per month as maintenance in that case. This is what the court in that case said at p 106:

> However bearing in mind the generous lifestyle that she was used to, we consider that a monthly sum of RM25,000 for her and Stefany would be sufficient to maintain both of them...

[28] In the same case the court also ordered that the husband to pay all the arrears of the maintenance sum ordered for a period of one year preceding the effective date of the order on the maintenance because the court in that case found that the husband had failed to maintain the wife and Stefanie during that period.

[29] In this instant case, the petitioner testified that she spent about RM700 per month for the children's tuition fees, with Cassandra having her tuition for all her subjects ie mathematics, English, Bahasa Malaysia, Science and her Art tuition. Cassandra also attended the piano class. The petitioner also testified that she spent another RM300 yearly on school books and another RM250 per month for exercise books, stationaries, pocket money and other incidental expenses. Other expenses which the petitioner testified are: RM500 per year for school uniforms and other clothings; RM200 per month for the children undergarments, school shoes, toiletries and towels and other personal comfort needs; RM500 per month for food and household expenses and RM500 for utilities and telephone bills. All these expenses add up to RM24,700 per year — an average of RM2,058.33 per month.

[30] PW7 who had assisted the petitioner in contributing to the upbringing of the children testified that he estimated a sum of between RM600 to RM700 a month for the two children Cassandra and Leonard.

[31] However, learned counsel for the first respondent, citing the case of *James Jemut Masing v Fiona Frances Masing nee Henderson* [1994] MLJU 531; [1994] 2 CLJ 390, submitted that the court should not allow the amount requested by the petitioner. Instead the court must have regard to the fact that first respondent had not been proven to be a man of substantial means and may be saddled with a burden if the amount requested by the petitioner is granted. He also submitted that on the evidence the first respondent is suffering from diabetes and other medical complications and has to spend

monies on his medication as well. In addition he said the first respondent also has current liabilities and commitments like the maintenance of his old car.

[32] In my view that is not the only factor that the court must consider. The purpose of the maintenance and its scope must also be looked at. In *Sivajothi a/p Suppiah v Kunathasan a/l Chelliah* [2006] 3 MLJ 184, the court looks at the nature of maintenance as a '*form of material provision that will enable an adult to live a normal life and a child to be brought up properly*'. The court also held that '*maintenance cannot mean only mere subsistence, ie the food she puts in her mouth but also means the clothes on her back, the house in which she lives and the money she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind*'. Then the court came up with a strong statement that '*it is a settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past ie during the existence of the marriage*'. Similar principle was stated in *C v A* [1998] 7 MLJ 101 which referred to an earlier case of *Raquiza v Raquiza* [1947] MLJ 202.

[33] Bearing the above considerations in mind, regard must also be given to the evidence by the first respondent, and this evidence is not seriously challenged, that he did not neglect the family and had not provided for maintenance since June 2004. However, the first respondent testified that since their separation in December 2004, the petitioner was the sole custody of their joint account in EON Bank Bhd which at the material time had a credit balance of about RM40,000 to RM50,000 and that he had never asked the petitioner to return a single cent of it.

[34] As to the law, ss 92 and 93 of the LRMDA 1976 provide for the power of the court to order a man to pay maintenance for the children; and s 93(2) of the LRMDA 1976 provides that a woman may be ordered to contribute towards maintenance of the children if the court is satisfied that it is a reasonable thing to do, having regard to her means.

[35] As to the maintenance for the petitioner, s 77 read together with s 78 of the LRMDA 1976 empower the court to make an order of maintenance for the wife having regard to the means and needs of the parties as well as the degree of blame which the court apportions to each party for the breakdown of the marriage. With regard to this issue, learned counsel for the first respondent submitted that the petitioner is not entitled to any maintenance. Firstly, she was and is earning so much more than the first respondent from her steady employment as administrative and account manager at Juara Sdn Bhd with her salary of RM2,700.

[36] However having regard to the evidence as to the means and need of the parties in this case and the law, I am of the view that a sum of RM1,500

per month would be a reasonable award of maintenance for the petitioner and the two children. The fact that the first respondent has no steady job or income or that he has medical and health problem with his diabetes, is not an excuse for the first respondent to avoid maintaining the petitioner and the two children Miss Cassandra and Master Leonard. The first respondent is an able bodied man and could find a job that suits his skill and health condition. In this respect PW3 Dr Lee Lak Moi testified in examination-in-chief that a chronic diabetic patient should be able to live and work as a normal life. There is no evidence offered by the first respondent that since the filing of the petition his diabetic condition had deteriorated.

[37] I am not convinced that the first respondent's diabetic condition was chronic and the first respondent suffered from mild stroke in 2007 as the first respondent attempted to show by producing evidence R-ID6, a discharge summary dated 26 October 2007 by Dr Marion Norlee. The reason is that the doctor who signed the discharge summary was never called to testify on the contents of the document. I also accept the evidence that the first respondent had failed to provide maintenance to the children since June 2004. However in view of the evidence that the first respondent since that time had allowed the petitioner to operate the joint account which have a credit balance of about RM40,000 to RM50,000. I will order that the first respondent pay the arrears of the maintenance ordered starting from the date of the petition which is 14 January 2005 until the date of this order which is 15 January 2009 and thereafter the maintenance is to be paid on the 15th day of each month until the children reach the age of 18 years. The first respondent is also ordered to pay all the arrears of maintenance within 60 days from the date of this order. Parties shall have liberty to apply if there is a change in circumstances.

ON MATRIMONIAL ASSETS

[38] In respect of this issue, the matrimonial assets are as follows: (a) the Kuala Lumpur condominium which was bought at RM175,000; (b) the Kasuma Resort Condominium in Kuching which is valued at RM300,000; (c) the house described as Lot 7306, Block 16 KLCD which had been sold off leaving a balance of the proceed RM16,034.67 deposited with Messrs SK Ling & Co, Advocates, Kuching; (d) 27 years old BMW 3 Series with registration No QKE 635 valued between RM10,000 to RM12,000; (c) one unit of Proton Waja bearing registration No QKQ 5847; (e) one unit Proton Saga bearing registration No SA 4216K; (f) jewelleries consisting of (i) 3 Rolex watches worth about RM18,000, one (1) ruby-diamond ring worth RM6,000, one (1) Kruger Rand Gold Coin worth about RM4,000 and several gold rings and pendant worth about RM2,000; (g) life insurance policies consisting of one whole life policy for RM25,000 and one

A Endowment Life Policy for RM200,000 and (h) the first respondent's EPF savings under EPF Account No 71091511.

[39] In her petition, the petitioner averred that the above assets were acquired through years of her savings, hard work, dedication to the family and selfless contributions and together the first respondent, the petitioner and the children were able to enjoy comfort of life, holidays and a good middle class living.

[40] At the trial evidence was led to show that the Kuala Lumpur condominium was under rental for about a year before it was auctioned off for RM300,000. The rental and the proceeds of the auction were used to pay off the arrears of the monthly payments on the loan for the said property and the outstanding balance of the loan respectively. The first respondent testified that the property was registered in his and the petitioner joint names but the petitioner never paid her share of the purchase price of the property. In any case with the property auctioned off, I do not think there is any necessity to make any order as to the division of this property since it no longer belonged to the first respondent or the petitioner or to both of them jointly.

[41] The Kasuma Resort Condominium, Kuching known as Unit 506 Block C, Camilla, is also registered under the joint names of the first respondent and the petitioner. Therefore, in law each of them is entitled to one half undivided share in the property. The petitioner and the two children were staying at the condominium until December 2004 when the petitioner moved out of the condominium taking the two children with her to stay at her brother's place. It is not disputed that the monthly instalment for the bank loan for the purchase of this property was paid by the first respondent. However, at the trial it was disclosed that no payment on the loan instalments had been made for more than two years. No reason was given for this; but most probably it is due to financial difficulty faced by the first respondent. Therefore this property is likely to be seized by the bank and to be auctioned off to recover the loan. However it is not clear on the evidence whether the property has been successfully auctioned off or not. What is certain is that the property is under foreclosure proceedings by the bank. In the circumstances, I will order that in the event the property is auctioned off by the bank, 50% of any excess or residue of the proceeds of the sale or auction after deducting repayment of the bank's loan and other permitted legal expenses connected with the auction or sale shall be paid to the petitioner.

[42] As regard the matrimonial property at Kasuma Resort Condominium, Kuching (as well as the Kuala Lumpur Condominium) also, the petitioner in her petition prays that the first respondent be ordered to pay monthly instalments for the two properties and that upon full settlement of the

purchase price, to transfer the two properties into the joint names of the two children as security for their future, welfare and education. The petitioner also prays that she and the two children Cassandra and Leonard be allowed to live at the Kasuma Resort Condominium, Kuching to provide home for the petitioner and the children. Alternatively, the petitioner prays that the first respondent be ordered to come up in term of cash for the petitioner to purchase a house equivalent to the matrimonial properties to be assessed by the court. In the alternative, also the petitioner prays that the value of the two condominiums be assessed by the court and all cash equivalent thereof be paid to the petitioner for maintenance and upkeep of the children until they attain the age of 21 years old. In this respect the petitioner testified that the value of the Kuala Lumpur Condominium was about RM175,000 and that the Kasuma Resort Condominium, Kuching was about RM300,000. But no valuation reports on the current market value of the two properties by a qualified valuer were tendered as evidence to support this claim. Without such evidence it is quite difficult for the court to assess the value of the two properties since the court does not have the expertise in that field.

[43] In any event, it is my view that the court cannot grant the petitioner's prayers in respect of the two properties. Firstly the Kuala Lumpur Condominium has been sold off. But no evidence were led by either side as to whether there were any excess or residue of the proceeds of the sale or auction available for distribution between the parties.

[44] Secondly in respect of the Kasuma Resort Condominium, Kuching, the petitioner did not assist the first respondent to pay the monthly instalment on the bank loan when the first respondent could not make the payment, and no evidence were adduced to show that the petitioner did so.

[45] Thirdly, the Kasuma Resort Condominium is already under foreclosure proceedings by the bank. If the property had not been auctioned off, it can be still saved if either the first respondent or the petitioner or both of them together made an effort to settle the outstanding sum owing to the bank. On the evidence, I do not think the first respondent is in the position to do just that. However there is also no evidence adduced to show that the petitioner had made an effort to pay the bank loan and save the property from being auctioned. In a marriage, each spouse bears equal responsibility to ensure that the family is not deprived of their matrimonial home. Therefore if one spouse is in difficulty to maintain the matrimonial home the other spouse must come to assist.

[46] Fourthly, the petitioner said she wanted the Kasuma Resort Condominium as a home for her and the children and had in fact prayed for the first respondent to vacate the property. This is evident by the petitioner's

advocate letter exh P8. Yet, the petitioner on her own decided to leave the Kasuma Resort Condominium taking with her the two children and went to stay with her brother. There is no evidence to show that the bank had asked them to move out of the Kasuma Resort Condominium because of the non-payment of the monthly instalment of the loan or of the foreclosure proceedings on the property. Therefore, it does not lie in the mouth of the petitioner to come to court and complain that she and her two children are squatting at her brother's home and they only have the use of the bedroom at her brother's home for the children to study and do their homeworks.

[47] However, the petitioner testified that she found it intolerable to live with the first respondent because the first respondent had become violent and abusive towards her since the first respondent got involved in an alleged affair with the second respondent.

[48] The effect of the involvement on the petitioner is very profound. According to PW3 in her medical report exh P5, the petitioner came to her in June 2004 and with complaint of insomnia, lost of appetite, moody and socially withdrawn. PW3's conclusion in her report exh P2 as to the condition of the petitioner is that the petitioner suffered depression due to the problems in her marriage. The depression she suffered in June 2004 was triggered by a difficult situation in her marriage and the anxiety in August 2004 was triggered by the violence at home.

[49] PW3 is a private medical doctor with post graduate degree to input the skill of family medicine and general medicine. Therefore, she is well qualified to assess the condition of the petitioner then. Nevertheless PW3 further advised the petitioner to see specialist psychiatrist for medical assessment in June 2004. The petitioner was later seen by the resident consultant at Normah Medical Specialist Centre, Kuching Dr Loy Jik Hua. In his report exh P6, Dr Loy found that the petitioner was indeed depressed and the precipitant for the depression was marital discord. He stated in exh P6 that there is no evidence of any paranoia or psychotic thinking or obsession and that there was no documentation of any paranoid or psychotic features. He also found that there was no evidence of any clinical depression.

[50] The first and second respondents never challenged the medical findings and conclusion in exhs P5 and P6. Therefore the first respondent's allegation that the petitioner had moved out of the matrimonial home at Kasuma Resort Condominium on her own free volition because of her neurotic or psychotic paranoid condition about the first respondent's alleged adulterous affair with the second respondent is baseless and without merit.

[51] In my view it is the duty of the husband and the father to provide a

roof above his family's head. In this case eventhough the petitioner and the children had moved out of the Kasuma Resort Codominium without being asked by the first respondent, the petitioner's act is justified. Under the circumstances in this case the act of the petitioner in moving out from the matrimonial home at Kasuma Resort Condominium does not deprive her of the right as a wife to demand from the first respondent a roof over her and the children's head. However in the circumstances of the case, I do not think it is just and fair or practical to order the first respondent to vacate the Kasuma Resort Condominium and to pay off the bank loan. On the last point, I do not think the first respondent has the financiall means to do so.

[52] Since I cannot grant the petitioner's prayers in respect of the two properties (ie the Kuala Lumpur Condominium and the Kasuma Resort Condominium) in the form prayed for by the petitioner, I will alternatively order the first respondent to provide a reasonable and suitable accommodation for the petitioner and the children of a standard as close as possible to the standard of living the petitioner and the children had enjoyed before the breakdown in their marriage; and in further alternative if the first respondent is unable to provide such accommodation, the first respondent is to pay the petitioner a sum of RM2,000 per month in lieu of rental to enable the petitioner to rent or purchase a suitable and reasonable accommodation for herself and the children. This payment shall continue until the children reach 18 years of age or until the petitioner remarry which ever is later. At the moment the evidence is that the petitioner and the children are squatting at the petitioner's brother's house.

[53] With regard to the jewelleries, the petitioner's estimate of the value of the three Rolex watches to be about RM18,000, the gold diamond ruby ring about RM6,000, the Kruger Rand gold coin worth RM4,000, the other gold coins worth RM4,000 and the gold rings and pendant about RM2,000. Some of these jewelleries were kept by the first respondent and some by the petitioner. From the testimony of the first respondent it appears that the marriage jewelleries from the first respondent's parents and from the first respondent himself and a Rolex watch were kept by the petitioners and the others must have been kept by the first respondent. The first respondent proposed that each party kept the jewelleries already with them. However, the petitioner wanted them all and in the alternative the cash equivalent of the three Rolex watches for her children.

[54] Section 76(4) of the LRMDA 1976 empowers the court to divide the matrimonial assets or the proceeds of the sale thereof in such proportions as the court thinks reasonable, except that the acquirer of the property in question should receive a greater share ie more than half: *Lee Yu Lan v Lim Thain Chye* [1984] 1 MLJ 56. In this case however there is no matrimonial

jewelleries she is currently keeping. But based on the type of jewelleries disclosed at the trial as stated above, the total value as estimated by the petitioner is about RM34,000. From this amount I think it is fair to award the petitioner RM15,000 and also let the petitioner keeps the other jewelleries with her.

[55] Learned counsel for the first respondent also urged the court to include the EPF account of both parties as 'matrimonial assets' for the purpose of division of matrimonial assets. The reason offered by the first respondent for this is that the first respondent has agreed for all of his savings in his EPF to be held in trust for his two children Cassandra and Leonard. The petitioner's EPF account is one where most of the contributions are paid into when both the petitioner and the first respondent were working at Leasewell Leasing Sdn Bhd where the first respondent's main incomes were out under the petitioner's name. *Lim Kuen Kuen v Hiew Kim Fook & Anor* [1994] 2 MLJ 693 is the authority that says EPF is matrimonial asset acquired during the marriage. The first respondent argued that because the major part of the first respondent's income while working at Leasewell Leasing Sdn Bhd was credited into the petitioner's name and EPF deductions were made on those income and paid into the petitioner's EPF account. Therefore it was contended by the first respondent that indirectly he had contributed towards the up bringing and maintenance of the children and the petitioner.

[56] On the evidence I have no doubt that the first respondent had paid for all the matrimonial properties from his income (ie the commission) from the sales of car for Leasewell Leasing Sdn Bhd. The first respondent testified that his commission per month while working at Leasewell Leasing Sdn Bhd was RM6,000 to RM8,000 per month depending on the condition of the market.

[57] Therefore I will order that both EPF accounts of the first respondent and the petitioner be included as matrimonial properties. And out of the total sum saved in both accounts, the petitioner may use only 40% of the saving therein and the other 60% is to be held in trust for the two children.

[58] The other asset claimed by the petitioner is the sum of RM16,034.67 held by Messrs SK Ling & Co, Advocates. However exh P13 shows that the actual amount with the advocates is only RM12,884.67 and the petitioner claimed that the amount should be paid to her as maintenance since the first respondent had failed to provide maintenance since June 2004. This amount is the balance of the proceeds from the sale of the Stampin house and this fact is not disputed. The house was sold in late 2004. The petitioner testified that when the Stampin house at Lot 7306, Block 16 KLCD was sold, she paid a sum of RM70,000 into their overdraft facility account with Hong Kong Bank

Berhad Kuching and then the first respondent withdrew RM55,000 from the account for his own use and promised to repay this amount. However till today the first respondent had not paid this amount. I would therefore consider it fair and reasonable to order the amount of RM12,884.67 to be paid to the petitioner towards the account of RM55,000 which I think on the evidence should be returned to the petitioner.

[59] As for the life insurance policy worth RM25,000 and the endowment life insurance policy worth RM200,000 the first respondent should continue to maintain this policy till maturity and the policies shall be held on trust for the two children.

[60] With regard to the BMW 3 Series currently used by the first respondent, this should remain with the first respondent. As to the monthly repayment of the Proton Saga currently used by the petitioner, the first respondent should contribute 50% of the monthly repayment until the full instalment payments on the car is settled. This is because the petitioner would require the car to move around and also for use to ferry the children to school and their other activities.

[61] As to the Kenari, I find no clear or conclusive evidence that the first respondent had bought or is using this vehicle. Therefore, I make no order on this purported property.

DAMAGES FOR ADULTERY AND GENERAL DAMAGES FOR ASSAULT, BATTERY, CRUELTY AND DOMESTIC VIOLENCE

[62] I will deal with the petitioner's allegations as to assault and battery first. The petitioner testified that in February 2004, the first respondent started to come home late and sometimes never came home at all. Petitioner testified that each time the respondent came home there were several marks on his neck which to the petitioner appeared to be love bites. The petitioner further testified that when she confronted the first respondent the latter admitted that he has an affair with the second respondent. The petitioner also testified that in March 2004 the first respondent verbally abused her at her place of work at Leasewell Leasing Sdn Bhd in front of all the salesmen.

[63] That evening when they got home the petitioner testified that the first respondent got so angry that he punched the petitioner on the head and dragged the petitioner by her hair and bang her head against the wall and used a plastic hanger to hit her in front of the children.

[64] Another incident of assault and battery by the first respondent testified

to by the petitioner is the incident in June 2004. In this incident the petitioner said the first respondent was angry after they got into argument regarding the first respondent coming home late or not coming home at all. The first respondent then according to the petitioner picked up a brass incense burner and wanted to slam it on her head. At that time the petitioner said her daughter Cassandra was there and Cassandra got hold of the first respondent's leg and asked the first respondent to stop. Fearing for her safety the petitioner said she ran upstairs and went to the bathroom. But the first respondent followed her to the bathroom and used his knuckles to hit the petitioner on her head. The first respondent also according to the petitioner kicked her in the stomach and her back several times. These beatings were witnessed by the children.

[65] Earlier in April 2004, at Kasuma Resort Condominium, the petitioner testified that the first respondent slapped her in front of the children.

[66] Another incident was on 3 August 2004. On this occasion the petitioner testified that the first respondent had grabbed hold a kitchen knife and wanted to slit her throat. In the incident the petitioner cut her right little finger in a scuffle with the first respondent. During her testimony the petitioner showed to the court the mark of the injury on her little finger. The petitioner lodged a police report exh P4 over the incident and the two police officers who took the petitioner's report (PW4) and who recorded a statement from the petitioner (PW5) were also called to testify. In their testimonies PW4 and PW5 corroborated the complaint by the petitioner as regard to this incident.

[67] The petitioner's testimony as to the assault and battery by the first respondent is corroborated by PW9, the petitioner's daughter, Cassandra Wong Xinyue. At the time of giving evidence PW9 was 13 years old. However when the court asked whether she understands the requirement to the truth she answered in the affirmative. Having seen PW9 testified I have no reason to doubt as to the truth of her testimony. She appears to me as an intelligent girl that is fully aware of the happenings around her especially the problematic relationship between her mother, the petitioner and her father the first respondent.

[68] On the evidence in this case, I find the first respondent is abusive of the petitioner and has inflicted injury physically and mentally on the petitioner. Therefore, I shall grant the injunction restraining the first respondent from assaulting, molesting or interfering with the petitioner after this order. However, I could not grant the prayer for the sum RM100,000 as damages for the assault, battery and cruelty claimed by the petitioner. I find no provision in the LRMDA 1976 that gives me the authority to do so. Also,

no authority was cited or shown to me by the petitioner's counsel to persuade me that I have the jurisdiction and authority to grant such relief. Furthermore, the claim for general damages for assault and battery is not prayed for in the petition.

[69] As to the allegation of the first respondent's adulterous affair with the second respondent, the evidence by the petitioner PW1 is that the first respondent started coming home late with 'love bites' on his neck. Then in April 2004, while she was walking with the children to the elevator at the basement car-park at Kasuma Resort she and the children saw the first and second respondents came out from the elevator. But on seeing the petitioner and the children they went back into the elevator. Again this evidence is corroborated by PW9.

[70] PW1 testified that later on the first respondent came down alone and had an argument with her at the basement of Kasuma Resort.

[71] PW1 also testified that sometime in August 2004, she went to Kasuma Resort after dropping off the children at school, to keep her appointment with her real estate agent for renting out of the condominium. On arrival there, PW1 said she saw the first respondent's car parked at the very end of the basement car park. PW1 testified she went up to the condominium and on opening the door she saw two pairs of shoes near the door. She shut the door and went down again to the basement car park and waited there for sometime. Later, she testified, the first and second respondents came out of the building and walked towards the first respondent's car at the basement car park. When the petitioner went back to the condominium after that, she went to the master bedroom and the bathroom. In the bathroom she found hair shampoo and feminine wash which did not belong to her. PW1 testified that she never used these things. This fact was not challenged by the first and second respondents. PW1 alleged that the feminine wash belonged to the second respondent because shortly after that the first defendant came back to the condominium to collect the feminine wash.

[72] PW1 further testified that when the first respondent saw her at the kitchen, the first respondent put down the feminine wash on the table in the kitchen and grabbed the kitchen knife and started to assault her. PW1 lodged a police report No 3719/04 at Simpang Tiga Police Station on the incident. The report is produced as ID4.

[73] In the master-bedroom PW1 saw the bed was untidy with one pillow on one side and the other pillow on the other side of the bed.

[74] PW1 also testified that on 29 Julai 2005 she and the children together

with her brother and her brother's family saw the first and second respondents sitting together at the Kuching Central Commercial Centre Park, and the first respondent totally ignored the children.

[75] It is also the petitioner's testimony that on one occasion she saw the first and second respondents coming down from a shop lot at Jalan Ban Hock in the morning. The petitioner testified that she believed the first respondent rented the premises there. The petitioner also testified that she saw the first respondent's car BMW QKE 635 parked near Jalan Ban Hock several times — usually in the evening and at night.

[76] The above testimony by the petitioner is generally not rebutted. The petitioner was cross-examined vigourously on the matter; yet she was steadfast in her story.

[77] It is a fact to be recognised that very rarely the act of adultery is proven by direct evidence. To be able to do so, there must be witness who saw and can testify to the actual act of adultery which would naturally involve a sexual act on the part of the parties alleged to have committed the adultery. More often the allegation of adulterous affair is proven by circumstantial evidence must be so strong that an innocent by stander would reasonably of the opinion that the alleged act has been committed.

[78] In *Wee Hock Guan v Chia Chit Neo & Anor* [1964] MLJ 217, it was held that an allegation of adultery must be proved beyond reasonable doubt. The evidence must be beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things adultery must have been committed; where the evidence is entirely circumstantial, the court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation. On the above principles and on the evidence in this case as narrated above, I am satisfied the circumstantial evidence herein not only shows that there is an opportunity for the first and second respondents were at the condominium at Kasuma Resort and later on the petitioner found on the bed in the master bedroom was in a mess as if it have been recently used. To confound this is the fact that the second respondent had left behind in the bathroom her feminine wash which was later picked up by the first respondent. Thus on evidence in this case I am satisfied that the first and second respondents have an adulterous affair and relationship. I am also satisfied that the presence of the second respondent in the married life of the first respondent and petitioner has contributed significantly to the breakdown of their marriage. Therefore I shall order that the second respondent pay the petitioner a sum of RM50,000 in damages. This sum is to be held in trust by the petitioner for the two children until they reach the age of 18 years.

[79] On the above reasons, I shall order that the marriage be dissolved and decree nisi to be absolute in three months from the date of the order. The care and custody of the two minor children Miss Cassandra and Master Leonard shall be given to the petitioner as previously agreed between the parties with reasonable access given to the first respondent. As to maintenance, division of matrimonial properties and damages for adultery, I shall make the order as decided and ordered earlier in this judgment.

[80] Lastly, I want to be on record that after the delivery of the decision in this case, learned counsel for the petitioner informed the court that both the first respondent and the petitioner have been declared bankrupt and that the first respondent holds two respective accounts for the children with Public Bank Berhad which is now frozen due to the bankruptcy order. Learned counsel for the petitioner made oral application for an additional order that the first respondent reports to the Director-General of Insolvency to resolve the status of the two accounts so that the children be entitled to utilise their respective bank accounts. Learned counsel for the petitioner also made an oral application for an order that the order of reasonable access to the two children granted to the first respondent be supervised in the presence of the petitioner. However I refused the two oral applications by learned counsel for the petitioner.

[81] As to the first oral application, I am of the view that the petitioner or the first respondent should make a formal application to the bankruptcy court to release the two accounts so that all parties could be heard on the issue. As to the second oral application, I am of the view that the first respondent and the two children should be given the opportunity and freedom to interact with each other without any supervision from the petitioner. After all, the first respondent is the biological father of the two children. Furthermore, there is no evidence throughout this trial that shows the first respondent having a violent disposition or any ulterior motives towards the children.

Petitioner's application allowed.

Reported by Kanesh Sundrum